

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2008-0022

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY DOUGLAS BRUCE REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY THE SCHUCK
CORPORATION, STEPHEN M. SCHUCK, MARK WALLER, AND THE "COMMITTEE
TO ELECT MARK WALLER" CANDIDATE COMMITTEE.**

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon the complaint of Douglas Bruce that the Schuck Corporation, through its Chairman of the Board, Stephen Schuck, and candidate Mark Waller, through his candidate committee, violated the laws relating to campaign finance. Specifically, Bruce alleges that Waller and his committee colluded with Schuck to receive a prohibited corporate contribution from the Schuck Corporation in the form of a corporate endorsement and campaign fund raising effort. Bruce alleges that Waller and his committee also violated the law by failing to report the contribution.

The Secretary of State received Bruce's unsigned complaint by e-mail July 9, 2008. The Secretary of State advised Bruce on July 10, 2008 that a signed complaint was required, which Bruce filed on July 17, 2008. Pursuant to Colo. Const. art. XXVIII, § 9, the Secretary forwarded the complaint to the Office of Administrative Courts (OAC) for hearing. Hearing was initially set for August 1, 2008, but continued upon Respondents' request and reset for August 25, 2008. Hearing was held that date at the Office of Administrative Courts in Colorado Springs, Colorado. Respondents were represented by Robert S. Gardner, Esq. Mr. Bruce represented himself.

Issues

Bruce is the currently serving State Representative for House District 15. Waller was Bruce's opponent in the 2008 Republican primary election for that office. During the campaign for the primary election, Waller met with Schuck and Schuck agreed to endorse Waller's candidacy, as well as solicit donations for his campaign. Schuck ultimately fulfilled this promise by a letter printed on his corporate letterhead and mailed to 208 prospective donors. Waller's committee did not report the value of this fund raising effort as a contribution. However, after Waller became aware of Bruce's complaint that the fund raising effort amounted to an illegal corporate contribution, his committee refunded to the Schuck Corporation the expenses it incurred on Waller's behalf and reported that payout as a campaign expense.

The issues to be decided are: 1) Was the fund raising effort of the Schuck Corporation a prohibited corporate contribution to the Waller campaign? 2) Did Waller

solicit the contribution and collude with Schuck to receive a prohibited corporate contribution? 3) If the Schuck Corporation's effort on Waller's behalf was a contribution, was it reportable?¹ 4) Did the Waller committee's decision to refund to the Schuck Corporation the expenses it incurred and to report the same as a campaign expense excuse its obligation to report the expenses as a contribution?

For the reasons explained below, the ALJ concludes that the Schuck corporation's fund raising effort was a prohibited corporate contribution to Waller's campaign, that Waller did not either solicit or collude in this violation, but that the Waller committee violated the reporting laws by not reporting the contribution.

Findings of Fact

1. Bruce is the incumbent State Representative for House District 15. Waller was Bruce's opponent in the 2008 Republican primary election for that office.

2. In approximately May 2008, Waller met with Schuck to solicit his support in the upcoming primary election. Schuck agreed to write and mail a letter to prospective donors endorsing Waller's candidacy and soliciting a campaign contribution on Waller's behalf. Waller agreed to provide Schuck with self-addressed return envelopes to be included with Schuck's mailings. Waller also provided Schuck with biographical background material for use in drafting the letter.

3. The Schuck Corporation is in the business of real estate development, and is privately held by Schuck and his family. There is no evidence that Waller solicited Schuck to involve his corporation in the endorsement or the fund raising effort.

4. Following the meeting, either Waller or someone from his campaign committee sent Schuck a proposed draft of his endorsement letter. Schuck, however, substantially rewrote the letter to his own satisfaction. On or about May 13, 2008, Schuck e-mailed his draft to Waller for his review. Exhibit A. Waller approved the draft with minor corrections.

5. The letter, as written by Schuck and approved by Waller, sought to "introduce" Waller as the preferred candidate for House District 15. The letter did not expressly urge readers to "vote for" Waller or to "vote against" Bruce, but concluded by saying "Doug [Bruce] has contributed much to our community and State, but both will be better served when Mark Waller replaces him in the State House." The letter also solicited a "generous donation" on Waller's behalf. Exhibit 2.

6. Although the e-mailed draft of Schuck's letter contained his title "Chairman of the Board" in the signature block as well as indications his secretary had typed the draft, it did not bear the Schuck Corporation letterhead and did not otherwise indicate it was to be sent on behalf of Schuck's corporation.

7. On or about May 30, 2008, Schuck transferred the letter to his corporate

¹ Waller contends that any potential reporting violation should be overlooked because it was not charged in Bruce's complaint. The ALJ does not agree because Bruce's complaint specifically raises an allegation that the contribution "was not reported." Complaint, p. 2.

letterhead, and mailed the letter together with a business reply envelope provided by Waller's committee, to 208 potential donors. Schuck also sent a copy of the final letter to Waller.

8. In total, the Schuck Corporation incurred expenses of \$264.20 for stationery, printing, postage and administrative staff time to prepare and mail the letter. At the time it incurred these expenses, the Schuck Corporation had no expectation of being reimbursed by the Waller committee or anyone else.

9. Prior to mailing the letter, Schuck informed Bruce by personal note that he was making an endorsement on Waller's behalf. Bruce subsequently received a copy of the Schuck Corporation letter from a colleague. Concerned that Waller had received an illegal corporate contribution, Bruce checked the Waller committee's reports to the Secretary of State to see if the committee listed the Schuck Corporation's effort as a contribution to Waller's campaign. Finding no such report, Bruce filed this complaint.

10. Immediately upon becoming aware of Bruce's complaint, Waller consulted with legal counsel. Believing that the Schuck Corporation's fund raising letter might be viewed as an impermissible corporate contribution, Waller instructed his committee to obtain an invoice from the Schuck Corporation of the expenses incurred in preparing the letter, and to reimburse the corporation that amount of money as if it were a campaign expense. An invoice for \$264.20 was obtained and on July 12, 2008 the Waller committee issued the Schuck Corporation a check in that amount. Exhibit B.

11. Pursuant to law and rules of the Secretary of State, the Waller committee was obligated to file periodic reports of its campaign contributions and expenditures. In its report for the period July 3, 2008 through July 16, 2008, the committee reported the \$264.20 payment to the Schuck Corporation as a "mailing expense," but it never reported the Schuck Corporation's endorsement and fundraising effort as a contribution.

12. Although the evidence is clear that Waller solicited Schuck's personal endorsement and fund raising help and that Schuck gave that help in the form of a letter prepared on his corporate letterhead, the evidence is not clear that Waller either knew Schuck was going to send the letter out under corporate letterhead or otherwise involve his corporation in the effort. Although the draft letter Waller reviewed bore Schuck's title as Chairman of the Board as well as his secretary's initials, Waller testified that he solicited Schuck's help as an individual and did not notice the indications in the draft letter that Schuck was intending to involve his corporation. Waller, an attorney, testified that he was well aware of the prohibition against corporate donations and would not have intentionally solicited help from Schuck's corporation, as opposed to Schuck personally. The ALJ finds Waller's testimony on this point credible. Furthermore, there was no apparent motive for Waller to risk violation of the law by involving Schuck's corporation as opposed to Schuck individually. For these and other reasons the ALJ finds the evidence insufficient to prove that Waller solicited a corporate donation from the Schuck Corporation, or that he knew Schuck intended to involve his corporation in the fund raising effort.

13. Waller was well aware, however, that Schuck was personally going to

engage in a fund raising effort on behalf of Waller's campaign, and that the effort would involve the printing and mailing of a letter by Schuck to a number of potential donors. Waller should have recognized that the expenses associated with this effort amounted to a contribution to his campaign, and should have reported it as such.

Discussion and Conclusions of Law

Colorado's Campaign Finance Laws

The primary campaign finance law in Colorado is Article XXVIII of the Colorado Constitution, which was approved by the people of Colorado in 2002. Article XXVIII imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and vests enforcement authority in the Secretary of State. Colorado also has statutory campaign finance law, known as the Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., which was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again substantially revised by initiative in 2002 as the result of the adoption of Article XXVIII. The Secretary of State, pursuant to regulations published at 8 CCR 1505-6, further regulates campaign finance practices.

The Fund Raising Expense Incurred by the Schuck Corporation Was a Prohibited Contribution

Colo. Const. art. XXVIII, § 3(4) prohibits contributions by corporations to a candidate committee. That section reads, in relevant part, "It shall be unlawful for a corporation ... to make contributions to a candidate committee." Exceptions exist for non-business corporations formed exclusively to promote political ideas, and for political committees or small donor committees established by corporations to accept contributions from its employees, officers and shareholders, but neither of those exceptions applies in this case.

"Contributions" are defined to include not only direct payments of money, but also "Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination ... or election." Colo. Const. art. XXVIII, § (2)(5)(a)(IV). The law is well established that payment of expenses by an entity to distribute campaign literature for the purpose of promoting a candidate's nomination or election is a contribution of this type. *Rutt v. Poudre Educ. Assn*, 151 P.3d 585, 591 (Colo. App. 2006)(the term "anything of value" is unambiguous and broad enough to include the organized effort to distribute campaign literature). Although the Court of Appeals' decision in *Rutt* was reversed on other grounds by *Colo. Educ. Ass'n v. Rutt*, No. 06SC559 (Colo. May 19, 2008), ___ P.3d ___ (Colo. 2008), the Supreme Court nonetheless agreed that money spent for employee salaries and campaign materials may be considered a contribution of "anything of value" when used to promote a candidate's election. *Slip Op.* at 35-39. The Schuck Corporations fund raising letter was a contribution of this type.

Though not raised by the parties, the ALJ notes that a contribution does not include services by volunteers. That exception, however, does not apply here because

only volunteer services by “individuals,” not corporations, are exempted. Colo. Const. Art. XXVIII, § 2(5)(b)(“Contribution’ does not include services provided without compensation by *individuals* volunteering their time on behalf of a candidate.”) *Italics* added. Furthermore, if a tangible product such as a fund raising letter is produced by a volunteer, the contribution includes the reasonable value of the materials used to create the product. See Secretary of State regulation 8 CCR 1505-6, rule 1.3.b.

The ALJ therefore has little difficulty in concluding that the \$264.20 incurred by the Schuck Corporation to print and mail the fund raising letter on Waller’s behalf was a contribution of that amount to Waller’s campaign.

Waller argues that when it recognized the letter was from the Schuck Corporation rather than Schuck personally, his committee legitimately chose to treat the transaction as an expenditure incurred by it for mailing services, which it then duly paid and reported. Waller argues that this situation should be treated as if his committee had ordered the fund raising letter to be prepared by a commercial printing service, in which case the expense incurred by the printing service to prepare the letter would not be considered an improper corporate expenditure or contribution. See Colo. Const. art. XXVIII, § 2(8)(b)(III) which exempts from the definition of “expenditure” money spent by persons “in the regular course and scope of their business.” The ALJ cannot agree with this argument, for several reasons.

First, the gist of Waller’s argument seems to be that by choosing to treat the contribution as an expense by his committee, he retroactively changed the character of the transaction from a prohibited corporate contribution to a legitimate campaign expense. The character of a payment as a contribution, however, is fixed at the time the contribution is accepted by the candidate committee. See Colorado Secretary of State regulation 8 CCR 1505-6, rule 4.3.1, “A contribution is considered made or received as of the date that it is accepted by the committee.” In this case, the contribution was accepted by the committee when, with Waller’s consent, Schuck incurred expense to prepare, print and mail the fund raising letter on Waller’s behalf. Its character as a contribution was fixed as of that date. Furthermore, there is no evidence that at that time the expense was incurred, Waller expected to pay or Schuck expected to receive compensation for Schuck’s effort. When Waller later became aware that the contribution was actually from the Schuck Corporation rather than Schuck individually, he was well-advised to give back to the corporation the value of the contribution received, but doing so did not erase the fact that a contribution had already been made.² Finally, the Schuck Corporation is in the business of real estate development, not printing campaign literature, therefore preparation and printing of the fund raising letter was not within the regular course and scope of its business. Only expenses incurred “in the regular course and scope of [an entity’s] business” are eligible for the exemption of § 2(8)(b)(III).

² Although Colo. Const. art. XXVIII, § 3(11) prohibits reimbursing any person for a contribution received, the ALJ does not interpret it to prohibit giving back an illegal contribution.

*Waller Did Not Solicit a Corporate Contribution, Nor Was
He Aware the Schuck Corporation Would Make One*

As noted in Finding of Fact No. 12, the ALJ rejects as unproven Bruce's allegation that Waller colluded with the Schuck Corporation to make a corporate contribution. Waller clearly solicited Schuck, individually, to make a contribution, but as previously discussed the evidence is not sufficient to prove he solicited a corporate contribution or was even aware that Schuck intended to involve his corporation in the fund raising effort.

Waller Was Nonetheless Obligated to Report the Contribution

Regardless of whether Waller and his committee recognized the contribution was coming from the Schuck Corporation or Schuck individually, the Waller committee was obligated to report it. Colo. Const. art. XXVIII, § 7 requires disclosures as set forth in § 1-45-108, C.R.S. of the FCPA. That statute requires the committee for a candidate running in the state primary election to file a report of all contributions and expenditures on the first Monday in July and on each Monday every two weeks thereafter. Section 1-45-108(2)(a)(I)(B), C.R.S.³ According to the Secretary of State's report filing schedule, the first such report was due July 7, 2008 and covered the period of May 27, 2008 through July 2, 2008.⁴ Therefore, given that Schuck's contribution was accepted on or about May 30, 2008, the contribution should have been reported in Waller's monthly report due Monday July 7, 2008. The contribution was not, however, disclosed in that or any subsequent report.

Although Waller subsequently reported the \$264.20 paid to reimburse the Schuck Corporation as a campaign expense, that report did not retroactively change the character of the Schuck Corporation's contribution nor did it relieve the Waller campaign of its obligation to report it as a contribution. While it may not have been wrong for the Waller committee to report the reimbursement as a campaign expense, that report did not relieve the committee from also reporting the \$264.20 as a contribution at the time it received the benefit of that contribution.

Summary

The Schuck Corporation made an illegal contribution to the Waller campaign by incurring expenses to conduct a fund raising effort to promote Waller's candidacy. Although Waller solicited the contribution from Schuck personally, and should have reported the contribution when received, Waller did not solicit the involvement of Schuck's corporation and therefore is not guilty of colluding with the Schuck Corporation to accept an illegal corporate contribution.

³ Monthly reports are also required beginning the sixth full month before the general election (§ 1-45-108(2)(a)(I)(C), C.R.S.), but where the due date for the monthly report approximates the due date for the biweekly report, the biweekly report also serves as the monthly report. See 8 CCR 1506-6, rule 5.2.

⁴ The ALJ takes judicial notice of the Secretary of State's 2008 filing calendar, at www.sos.state.co.us.

Sanctions

Colo. Const. art. XXVIII, § 9(2)(a), directs that if the ALJ determines a violation has occurred, the ALJ is to include in his decision “any appropriate order, sanction, or relief authorized by this article.” Section 10(a), in turn, authorizes a civil penalty of two to five times the amount contributed or received in violation of the constitutional contribution limits; and § 10(2)(a) authorizes a civil penalty of \$50 per day for each day that a report required by § 1-45-108, C.R.S. is late.

Against the Schuck Corporation

The Schuck Corporation violated Colo. Const. art. XXVIII, § 3(4) by contributing the value of printing and mailing the fund raising letter in support of Waller’s campaign. It is therefore subject to a penalty of two to five times the \$264.20 contributed. In determining the appropriate multiplication factor, the ALJ takes into account that the Schuck Corporation is a small privately owned family company. There is no evidence that it holds the kind of political power associated with the campaign abuses sought to be addressed by the prohibition against corporate contributions, or that it is politically sophisticated. The ALJ also takes into account the fact that although Schuck’s letter on Waller’s behalf actually makes reference to the prohibition against corporate contributions, Schuck was not personally aware that the cost of printing and mailing campaign literature was considered a contribution. Though not a defense, it mitigates Schuck’s culpability. Under the circumstances, the ALJ concludes that a multiplication factor of two, for a total civil penalty against the Schuck Corporation of \$528.40, is appropriate. Such penalty shall be remitted to the Secretary of State within 30 days of the date of this decision.

Bruce asks that a separate penalty be assessed against Schuck, personally. Even assuming a separate penalty could be imposed against both the offending corporation and its CEO, the ALJ finds no justification to do so in this case. An individual, including a corporate CEO, is free to express his personal opinion for a candidate, volunteer time on behalf of a candidate, and make contributions to a candidate within lawful contribution limits. Mr. Schuck would therefore have been within the law to personally support the Waller campaign. Although Mr. Schuck erred by supporting Waller through the Schuck Corporation rather than individually, the ALJ finds no merit in unnecessarily multiplying the penalties. One penalty against the corporation serves to vindicate the purpose of the campaign finance laws.

Sanctions Against Waller and the Waller Committee

A candidate or committee that has received an illegal contribution is, at least arguably, subject to a penalty for receiving that contribution.⁵ However, where the candidate is not aware that an illegal contribution is being made, it may be unjust to

⁵ Colo. Const. art. XXVIII, § 10(1) reads, in pertinent part, “Any person who violates any provision of this article relating to contribution ... limits shall be subject to a civil penalty of at least double and up to five times the amount contributed, *received* ... in violation of this article.” *Italics added.*

sanction the candidate.⁶ This is especially true where, as here, the candidate refunds the contribution when he becomes aware that it was an illegal corporate contribution. Therefore, under the circumstances of this case, the ALJ therefore finds no cause to impose a penalty upon Waller for accepting an illegal contribution.

The Waller committee, however, is subject to a \$50 per day penalty for failing to report the Schuck contribution. The fund raising letters were prepared and mailed on or about May 30, 2008 with Waller's knowledge, and therefore the value of that effort should have been reported as a contribution on the Waller committee's report due July 7, 2008. The reporting of the \$264.20 refund to the Schuck Corporation as a campaign expense did not relieve the committee of its obligation to also report the \$264.20 as a contribution. Forty nine (49) days elapsed from the date the contribution report was due on July 7, 2008 to the date of the hearing, for a failure to file penalty of \$2,450 (\$50/day x 49 days = \$2,450). Candidates are personally liable for penalties imposed upon the candidate's committee. Colo. Const. Art. XXVIII, § 10(1). Mr. Waller or his committee shall pay this penalty to the Secretary of State within 30 days of the date of this opinion.

Bruce also asks for a separate penalty against Mr. Waller, personally. Even if such a penalty were legally permissible, the ALJ finds no reason to impose a second penalty upon Mr. Waller. The ALJ finds no plan or intent by Waller to evade the reporting laws. Under the circumstances, a single penalty, for which Waller and his committee are jointly liable, is sufficient to vindicate the purpose of the law.

Agency Decision

The Schuck Corporation made an illegal corporate contribution in violation of Colo. Const. art. XXVIII, § 3(4). A penalty of \$528.40 is imposed against the Schuck Corporation for that violation. The Waller committee violated Colo. Const. art. XXVIII, § 7 and § 1-45-108, C.R.S. by failing to report the contribution in its required reports. A penalty of \$2,450 is jointly imposed against Mr. Waller and his candidate committee for that violation.

Done and Signed

September 2, 2008

ROBERT N. SPENCER
Administrative Law Judge

Digitally recorded
Exhibits admitted:
Joint exhibit I
Complainant exhibits 1, 2
Respondent exhibits A, B, C

⁶ In *Colo. Educ. Ass'n v. Rutt*, *supra*, the Colorado Supreme Court recognized in dicta that it may be unjust to hold a candidate responsible for receiving a prohibited contribution if the candidate is not aware of the contribution. *Slip Op.* p. 42.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Rep. Douglas Bruce
P.O. Box 26018
Colorado Springs, CO 80936

Robert S. Gardner, Esq.
Law Office of Robert S. Gardner
128 South Tejon Street, Suite 206
Colorado Springs, CO 80903

and

William Hobbs
Secretary of State's Office
1700 Broadway, Suite 270
Denver, CO 80290

on this ____ day of September 2008.

Court Clerk